No. 18-422

IN THE
Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

Appellants,

v.

COMMON CAUSE, ET AL.,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF AMICUS CURIAE SENATOR SHELDON WHITEHOUSE IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*

Amicus is U.S. Senator Sheldon Whitehouse of Rhode Island.[1] In *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), *amicus* submitted a brief with the late Senator John McCain of Arizona to provide a bipartisan view of how partisan gerrymandering threatens our democracy. *See* Br. of Senators John McCain and Sheldon Whitehouse, 2017 WL 4311105 (filed Sept. 5, 2017). Because the concerns expressed in that brief are just as relevant today, *amicus* presents the same arguments in this brief.

As a national political leader, *amicus* has a strong interest in the proper functioning of our democracy, and is a witness to the symptoms and ill effects of its distress. As an active, democratically elected legislator, *amicus* is deeply concerned about the damage excessive partisan redistricting inflicts on the American democratic process.

Amicus sees firsthand the concerns of constituents who increasingly view politics as a game run by powerful special interests that have changed the rules to win the game. The age-old problem of an "influencer class" is worsening, and the public sees this class garnering disproportionate rewards at the public's expense. Gerrymandering is a tool of the influencer class in that effort.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel made any monetary contributions intended to fund the preparation or submission of this brief. The parties have filed letters with the Clerk consenting to the filing of all amicus briefs in this case.

Americans do not like gerrymandering. They see its mischief, and absent a legal remedy, their sense of powerlessness and discouragement has increased, deepening the crisis of confidence in our democracy. *Amicus* shares this perspective. From this vantage point, *amicus* sees wasted votes and silenced voices. *Amicus* sees hidden power. And *amicus* sees a correctable problem.

Amicus submits this report from the political front lines in the hope that it will aid the Court by providing pragmatic, real-world input on the ways in which partisan gerrymandering undermines our democracy. These concerns should be central to the Court's review of whether the district courts correctly held that the North Carolina and Maryland redistricting schemes constitute unconstitutional partisan gerrymanders.

On a personal note, *amicus* mourns the loss of his friend and colleague and submits this brief in his honor.

INTRODUCTION AND SUMMARY OF ARGUMENT

These cases implicate the effective functioning of American representative democracy. With roots tracing to Patrick Henry and Massachusetts Governor Elbridge Gerry, politically motivated redistricting has long been a part of American politics. But what began as a tactic to protect individual incumbencies and to undercut adversaries has morphed into something much different today. Partisan gerrymandering is now accomplished by using sophisticated technology—including mapping software, census data, and

voting algorithms—to redraw a state's district lines to maximize partisan advantage across an entire state.[2]

This new breed of "bulk" partisan gerrymandering distorts statewide votes, systematically diluting the effect of votes based on political affiliation and leading to the election of congressional and state legislative delegations that do not represent the will of the voters. This practice violates "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015) (internal quotation marks omitted). And importantly—as demonstrated by the redistricting schemes at issue in the cases now before the Court—extreme partisan gerrymandering is a bipartisan problem, undertaken by Republicans and Democrats alike in an effort to entrench political power at the expense of the American voter.

I. A. The rise of extreme partisan gerrymandering over the past decade can be traced directly to this Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Although partisan gerrymandering existed before *Vieth*, the threat of judicial review provided a strong deterrent that kept states from adopting extremely gerrymandered districts. *Vieth*'s refusal to treat partisan gerrymandering claims as justiciable effectively removed this threat. State legislatures—and political operatives seeking to gain and entrench

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[2] *See* Sheldon Whitehouse, *Captured: The Corporate Infiltration of American Democracy* 83–86 (2017); Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. Times Mag. (Aug. 29, 2017).

political power—have viewed this decision as an invitation to redraw districts to push the limit of partisan advantage. As the American Bar Association observed, "[t]he Court's recent decisions appear to give legislators leeway to [preserve] partisan advantage as zealously as they like when drawing district lines."[3]

B. The increase in partisan gerrymandering in recent years has been bolstered by the growing presence of "dark money" in the American political system.[4] Special interest groups, fueled by hidden funders with deep pockets and skin in the political game, are now focused on influencing redistricting. The payoff for these groups is obvious: By shaping the decennial redistricting process, special interest groups can affect the outcome of every congressional race in a state for the next decade. The role of dark money in this process is a bipartisan concern, as both Republicans and Democrats now rely on this funding.

C. This Court has already acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles." *Vieth*, 541 U.S. at 292. Severe partisan gerrymandering undermines our democracy, which is based on fair and open elections that accurately reflect the will of the people and count every vote equally. When the voters of a state vote one way, the resulting congressional delegation is more than 2-1 the opposite way, and the advantaged party intentionally produced that undemocratic result, it should

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[3] J. Gerald Hebert, Paul M. Smith, Martina E. Vandenberg, & Michael B. DeSanctis, A.B.A., *The Realist's Guide to Redistricting: Avoiding the Legal Pitfalls* 19 (2d ed. 2010).

[4] The term "dark money" refers to money contributed to nonprofit organizations and used for political purposes without disclosure of the donor's identity.

be obvious that "one person, one vote" has been violated. This partisan gerrymandering leads voters to perceive, rightly, that their votes do not matter. Indeed, we have seen firsthand the growing concerns of constituents who view politics as a game orchestrated by powerful special interests whose victories come at the expense of the American voter.

II. The Court should affirm the district court decisions. The district courts relied on equal protection and First Amendment tests that provide a workable framework for distinguishing between district maps drawn based on legitimate political considerations and those constituting unlawful partisan gerrymandering. The tests are more than sufficient to find an unconstitutional gerrymander on the facts of these cases. Beyond remedying the constitutional violations present in these cases, affirming the district court decisions will send a clear message that partisan gerrymandering will not be tolerated.

ARGUMENT

I. Partisan Gerrymandering Has Become A Tool For Powerful Interests To Distort The Democratic Process.

Democracy is not abstract or academic. It is a battleground on which competing interests exert all the pressure they can muster. This battleground often pits special interest groups against a general population that wants only to be treated fairly.[5]

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[5] This is a long-observed conflict, reflected in the pages of history from Niccolo Machiavelli's writings to President Jackson's bank veto message. *See, e.g.*, Niccolo Machiavelli, *The Prince*, ch. IX

Special interest groups have long influenced the outcome of elections. But this Court's decision in *Vieth* made redistricting a particularly attractive tool for these groups. No longer concerned about the prospect of judicial review, state legislatures now push gerrymandering to its limits, and special interests, supported by dark money, help them do so. The result has greatly undermined the public's faith in our democracy.

A. *Vieth* Opened The Door To Extreme Partisan Gerrymandering.

Justice Kennedy, in his concurring opinion in *Vieth*, predicted that "if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow." 541 U.S. at 312. That prediction has come true. The frequency and egregiousness of partisan gerrymandering has intensified in the decade since *Vieth*, and absent this Court's intervention, the problem is only likely to worsen. Without the threat of judicial review, political parties have every incentive to engage in extreme partisan gerrymandering.

(1513) (speaking of "two distinct parties" in a governed society: one, "the nobles [who] wish to rule and oppress the people," and two, "the people [who] do not wish to be ruled nor oppressed by the nobles"); Andrew Jackson, *Veto Message Regarding the Bank of the United States* (July 10, 1832), *available at* http://avalon.law.yale.edu/19th_century/ajveto01.asp (distinguishing between "the rich and powerful [who] too often bend the acts of government to their selfish purposes" and the "humble members of society—the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves").

Vieth sent a clear signal that the Court was no longer inclined to intervene in partisan gerrymandering cases.[6] *Vieth*'s impact has been felt since 2010—the first round of redistricting after the decision—as state governments sought to redraw electoral maps for partisan advantage more aggressively than ever before.[7] Observers have recognized that "[t]he world changed with the 2010 redistricting. States were no longer constrained by the threat of judicial challenge of partisan gerrymanders, and where one party completely controlled the redistricting process, it often took full advantage."[8]

The North Carolina map currently before the Court illustrates how partisan gerrymandering evolved after *Vieth*. In 2010, Republicans gained control of North Carolina's General Assembly and, with it, exclusive control over the redistricting process. *See Rucho* J.S. App. at 10. The next year, they adopted a new map that allowed Republicans to win a supermajority of the state's congressional seats (9 of 13) in the 2012 election despite receiving a minority of the statewide vote (49%). *Id.* at 13. In 2014, Republicans gained an additional seat, meaning they won 10 of 13 seats with only 54% of the statewide vote. *Id.* at 13-14.

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[6] Anthony J. McGann, et al., *Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty* 5 (2016) ("[A]fter *Vieth v. Jubelirer* (2004), state legislatures were willing to district for partisan advantage far more than they had previously.").

[7] *Id.* at 3.

[8] *Id.* at 17.

North Carolina was forced to adopt a new map for the 2016 elections after courts invalidated the previous map as a racial gerrymander. *Id.* at 14, 24. The General Assembly created the new map using "Partisan Advantage" as a criterion. *Id.* at 20. One of the Republican leaders explained that "the goal" of this criterion was "to elect 10 Republicans and 3 Democrats." *Id.* at 23. Republicans succeeded. In the 2016 elections, they won 10 of 13 congressional seats (77%) despite receiving only 53% of the statewide vote. *Id.* at 26.

North Carolina was not alone in seizing the opportunity presented in *Vieth* for partisan gerrymandering without judicial oversight. Wisconsin also implemented a gerrymandered map for General Assembly elections designed to ensure that "Republicans would maintain a majority *under any likely voting scenario*; indeed, they would maintain a 54 seat majority while garnering only 48% of the statewide vote. The Democrats, by contrast, would need 54% of the statewide vote to capture a majority." *Whitford v. Gill*, 218 F. Supp. 3d 837, 852 (W.D. Wis. 2016) (emphasis added), *vacated and remanded*, 138 S. Ct. 1916 (2018). The Wisconsin plan produced precisely this lopsided result in the 2012 election that followed, in which Republicans won 60 of 99 General Assembly seats despite receiving only 48.6% of the statewide vote. *Id.* at 853.

Pennsylvania provides another example of extreme gerrymandering in the wake of *Vieth*. Following the 1990 Census, Pennsylvania's congressional districts were relatively compact with few oddly shaped districts, and had little or no partisan bias.[9]

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[9] McGann, *supra* note 6, at 9.

After the 2000 Census, the redistricting plan had a few more oddly shaped districts and indications of partisan bias, but the plan was approved by the district court and affirmed by the Court in *Vieth*.[10]

After the 2010 Census, Pennsylvania's districting plan changed dramatically, pushing partisan gerrymandering to its limits. The previously compact districts were largely replaced by districts that are "either elongated or have tendrils that cut into the surrounding districts."[11] From the Republicans' perspective, these changes worked: In the 2012 House elections, Democrats received more votes than Republicans, but the state sent thirteen Republicans and only five Democrats to Congress.[12] This scheme ultimately drew the attention of the Pennsylvania Supreme Court, which in 2018 redrew Pennsylvania's districts after finding that the Republican redistricting plan violated the state's constitution.[13]

Scholars have concluded that this Court's decision in *Vieth* was the primary reason for Pennsylvania's efforts to further gerrymander its congressional districts.[14] When the post-2000 districts were drawn,

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[10] *Id.* at 11.

[11] *Id.* at 13.

[12] Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 Notre Dame J. L. Ethics & Pub. Pol'y 323, 329 (2014).

[13] *League of Women Voters of Pa. v. Commonwealth of Pa.*, 181 A.3d 1083 (Pa. 2018).

[14] McGann, *supra* note 6, at 3. The increase in partisan gerrymandering from the 2000 Census to the 2010 Census is clear even if one controls for a variety of other factors, including urban concentration, changes in technology, and the requirements of the Voting Rights Act. *See id.* at 4–5, 12.

gerrymandering for political gain could still be meaningfully challenged in the courts, which explains "why the level of partisan gerrymandering was quite modest in the post-2000 districts compared to the post-2010 ones, even though the Republicans controlled the governorship and state legislature in both cases."[15] The congressional districts adopted after *Vieth*, in contrast, "show the full potential of partisan gerrymandering when there is no threat of judicial action."[16]

The combined effect of partisan gerrymanders in 2012 resulted in Republicans gaining a 33-seat advantage in the House, despite receiving more than one million fewer votes than Democrats.[17] Most of this advantage can be attributed to Republicans successfully tilting the electoral maps in key swing states.[18]

Republicans have certainly benefited from post-*Vieth* bulk gerrymandering, but they are hardly alone in skewing district lines for political gain. As one commentator noted, partisan gerrymandering is "a decennial sin of every majority party."[19] Where Democrats

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[15] *Id.* at 12.

[16] *Id.* at 13 ("In the previous round, the Pennsylvania state government had to consider the possibility that the courts would strike down a blatantly gerrymandered districting plan. After *Vieth v. Jubelirer* (2004), this was no longer the case.").

[17] Stephen Ohlemacher, *GOP Gerrymandering Creates Uphill Fight for Dems in the House*, PBS NewsHour (Mar. 31, 2014), http://www.pbs.org/newshour/rundown/gop-gerrymandering-creates-uphill-fight-dems-house/.

[18] *Id.*

[19] *Why Democrats are Taking Aim at Gerrymandering*, The Economist (July 12, 2017), https://www.economist.com/blogs/economist-explains/2017/07/economist-explains-6.

have been in control, they have drawn gerrymandered maps just like their Republican counterparts.

The Maryland plan before the Court illustrates as much. Following the 2010 Census, Democrats sought to redraw district lines to improve upon the 6-2 advantage they already enjoyed in the state's congressional delegation. *See Lamone* J.S. App. 14a. Democrats took aim at Maryland's Sixth District, which had elected a Republican representative for the previous two decades. *Id.* at 3a, 7a. Working with hired data analysts using sophisticated mapping software, Democrats successfully implemented the Governor's goal of creating a 7-1 map. *See id.* at 12a, 16a, 18a, 22a. The plan "effect[ed] a swing of about 90,000 voters," which "br[ought] about the single greatest alteration of voter makeup in any district in the Nation following the 2010 census." *Id.* at 2a. After the reshuffling, a Democratic challenger unseated the district's ten-term Republican incumbent, confirming that "[t]he result of the wholesale recomposition of the Sixth District was precisely as intended and predicted." *Id.* at 24a; *see also id.* at 11a.

Democrats also led successful partisan redistricting efforts in Illinois. In 2010, Republicans held 11 of Illinois' 19 House seats. After Democrats redrew the district lines in 2011, they took 12 of Illinois' 18 seats in the 2012 election. Although challenged by Republicans, a federal district court, relying heavily on *Vieth*, upheld the gerrymander despite finding that it was "a blatant political move to increase the number of Democratic congressional seats." *Comm. for a Fair*

and Balanced Map v. Ill. State Bd. of Elections, 835 F. Supp. 2d 563, 567 (N.D. Ill. 2011).[20]

In short, partisan gerrymandering has worsened significantly since *Vieth* removed the threat of judicial review, and bulk gerrymandering has been the vehicle. With the 2020 Census quickly approaching, the Court should curb this pernicious practice.

B. Dark Money Fuels Partisan Gerrymandering On Both Sides Of The Aisle.

As state governments become more willing to engage in partisan gerrymandering post-*Vieth*, a predictable result has occurred: Special interest groups, funded by dark money, are playing an increasingly active role in redistricting.

Drawing district lines that maximize partisan advantage is a complicated task. Legislators therefore turn to outside consultants and organizations, which offer detailed guidance on how to redraw district maps. These groups rely on sophisticated mapmaking software, census data, and partisan voting algorithms to determine how best to maximize partisan gain.[21] This expertise is expensive, but special interest groups are willing to foot the bill because they recognize the potential return on their investment. Spending money to help a House candidate in an election

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[20] *See also* Catanese, *supra* note 12, at 331 (discussing Illinois as an example of a Democratic-controlled gerrymander).

[21] *See, e.g.*, *Lamone* J.S. App. at 17a–18a; Bazelon, *supra* note 2; Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* 411 (2016) ("The advent of computers had turned redistricting into an expensive, cynical, and highly precise science.").

can change the occupant of that seat for the next two years. But spending to support redistricting can change every House race in the state for the next decade.

Financial support from groups accepting dark money has been crucial to recent gerrymandering efforts, and redistricting groups in most states can take unlimited amounts of money without disclosing the source. In early 2010, the Republican State Leadership Committee created the Redistricting Majority Project ("REDMAP") with the goal of redrawing electoral maps to benefit Republican candidates.[22] In 2010, REDMAP raised more than $30 million—much of it dark money—to elect majorities in state legislatures in battleground states including Ohio, Michigan, North Carolina, Pennsylvania, and Wisconsin.[23] After gaining control of state legislatures, REDMAP then expanded its efforts to influence the redistricting of those states' congressional seats.[24]

The Republicans' redistricting efforts were largely supported by "opaque nonprofits funded by dark money, supposedly nonpartisan campaign outfits, and millions in corporate donations to achieve Republican-

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[22] *See* Republican State Leadership Comm., *The Redistricting Majority Project*, http://www.redistrictingmajorityproject.com/ (last visited Mar. 6, 2019) ("Republicans have an opportunity to create 20–25 new Republican Congressional Districts through the redistricting process over the next five election cycles, solidifying a Republican House Majority."); Olga Pierce, et al., *How Dark Money Helped Republicans Hold the House and Hurt Voters*, ProPublica (Dec. 21, 2012 3:36 PM ET), https://www.propublica.org/article/how-dark-money-helped-republicans-hold-the-house-and-hurt-voters.

[23] Pierce, et al., *supra* note 22.

[24] *Id.*

friendly maps throughout the country."[25] Among the organizations funding REDMAP were groups with such seemingly neutral names as American Justice Partnership, Fair and Legal Redistricting for North Carolina, and Michigan Redistricting Resource Institute.[26] The neutral names disguise these organizations' underlying agendas.[27]

The strategy behind this effort was clear, and the political intent unmistakable. In 2010, one of REDMAP's early boosters wrote in the Wall Street Journal that Republicans were targeting state legislatures because "[h]e who controls redistricting can control Congress."[28] REDMAP's own 2012 Summary Report highlighted how their "strategy of targeting state legislative races in 2010 led to a Republican U.S. House Majority in 2013."[29] REDMAP explained: "Drawing new district lines in states with the most redistricting

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[25] *Id.* ("Two tobacco giants, Altria and Reynolds, each pitched in more than $1 million to the main Republican redistricting group, as did [Karl] Rove's super PAC, American Crossroads; Walmart and the pharmaceutical industry also contributed. Other donors, who gave to the nonprofits Republicans created, may never have to be disclosed.").

[26] *Id.*

[27] *See, e.g.*, Peter Overby, NPR News Investigations, *From Social Welfare Groups, a River of Political Influence* (Nov. 5, 2013 5:00 AM ET), http://www.npr.org/2013/11/05/242354030/from-social-welfare-groups-a-river-of-political-influence (describing American Justice Partnership as an organization dedicated to legal reform that has "target[ed] liberal judges for defeat").

[28] Karl Rove, *The GOP Targets State Legislatures*, Wall St. J. (Mar. 4, 2010 5:01 AM ET), https://www.wsj.com/articles/SB10001424052748703862704575099670689398044.

[29] The Redistricting Majority Project, *2012 REDMAP Summary Report* (Jan. 4, 2013) (capitalization altered), http://www.redistrictingmajorityproject.com/.

activity presented the opportunity to solidify conservative policymaking at the state level and maintain a Republican stronghold in the U.S. House of Representatives for the next decade."[30]

The Democratic Party also has supported its redistricting efforts by accepting "secretive redistricting funding."[31] For example, as noted above, Maryland Democrats gerrymandered congressional districts behind closed doors to preserve their incumbencies while taking aim at the state's two remaining Republican seats. As former governor Martin O'Malley explained in a deposition, "part of our intent was to create a map that was more favorable for Democrats over the next ten years."[32] To that end, Democrats hired outside consultants to redraw the district lines. Those consultants later testified that their job "was to see if there was a way to get another Democratic district in the state."[33] They succeeded, and Maryland's two Republican seats shrunk to one.

Democrats too have relied on nonprofit organizations, funded by dark money, for support in redistricting. Like the Republican groups, these groups have nonpartisan-sounding names, such as Democracy Alliance, America Votes, and Patriot Majority USA, that belie their political agendas.[34] Patriot Majority USA,

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[30] *Id.*

[31] Pierce, et al., *supra* note 22.

[32] *Lamone* J.S. App. at 13a.

[33] *Id.* at 16a.

[34] *See, e.g.*, About, America Votes (last accessed Mar. 6, 2019), https://americavotes.org/about/ (describing America Votes as "the coordination hub of the progressive community," with "an eye on redistricting"); Richard Berman, *The Democrats' Dark*

a 501(c)(4) social welfare group not required to publicly disclose its donors, reportedly raised $30 million in 2014 and "was a major player in the Democrats' failed bid to retain control of the U.S. Senate" in 2014.[35] Unions have reportedly donated to Patriot Majority USA,[36] as well as to "an array of 'dark money' liberal advocacy groups including the 501(c)(4) arms of the Center for American Progress, National Employment Law Project, and Partnership for Working Families—which aren't required to report who funds them."[37]

As troubling as these examples are, *amicus* expects that the influence of special interests groups and dark money in redistricting efforts will increase unless this Court steps in. One recent study found that 38 times more dark money was spent during the 2014 elections than in 2006.[38] And political groups are

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[35] Michael Beckel, *Secret Donors Fuel Democratic Political Powerhouse*, Ctr. for Pub. Integrity (Nov. 18, 2015), https://www.publicintegrity.org/2015/11/18/18875/secret-donors-fuel-democratic-political-powerhouse.

[36] *Id.*

[37] Berman, *supra* note 34.

[38] Chisun Lee, et al., Brennan Ctr. for Justice, *Secret Spending in the States* 3 (June 26, 2016), https://www.brennancenter.org/publication/secret-spending-states.

gearing up for the next round of redistricting. Democrats are already planning for a 2020 redistricting campaign, including through groups funded by "dark money,"[39] and Republicans will surely do the same.

This is just one of many ways in which dark money plagues United States elections, but it is a significant one.

C. Partisan Gerrymandering Produces Uncompetitive And Unrepresentative Districts That Have A Corrosive Effect On Our Democracy.

"Something is rotten in the state of Denmark," wrote Shakespeare to convey the notion of disease in the body politic. Here too, there is a powerful sense among Americans that something has gone awry.[40]

The increase in partisan gerrymandering following *Vieth*, fueled by dark money contributions and advanced technology, distorts our representative democracy and pollutes Americans' faith in their political institutions. This Court has long recognized

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[39] *Id.*

[40] These concerns are well-founded, with recent studies illustrating the high rewards (a return of nearly 1000-1 for lobbying expenditures) and high stakes (over $700 billion per year for one subsidy) for America's influencer class. *See* Bill Allison & Sarah Harkins, Sunlight Found., *Fixed Fortunes: Biggest Corporate Political Interests Spend Billions, Get Trillions* (Nov. 17, 2014), https://sunlightfoundation.com/2014/11/17/fixed-fortunes-biggest-corporate-political-interests-spend-billions-get-trillions/; Laurence Cockroft & Anne-Christine Wegener, *Unmasked* 14 (2017) (showing a 750-1 ratio); *see also* http://priceofoil.org/fossil-fuel-subsidies/.

that "[t]he true principle of a republic is[] that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540–41 (1969) (quoting Alexander Hamilton in 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). The current practice of partisan gerrymandering undermines that principle, because it "enables politicians to entrench themselves in power against the people's will." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring); *see also id.* at 1940. As one commentator recently observed, "[i]t used to be that the idea was, once every two years voters elected their representatives, and now, instead, it's every ten years the representatives choose their constituents."[41]

As Republicans and Democrats battle each other to control redistricting, the real losers are the American people. Sending delegations to Congress that do not conform to the results of elections leads to disinterested and justifiably disillusioned voters. Ordinary voters may not identify the dark money forces that have separated a state delegation's makeup from that state's election results, but they surely see that some dark force is intermediating to create that anomalous outcome. Realizing that their votes have been gerrymandered into near-meaninglessness, many Americans are checking out of the process entirely, as

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[41] *See* Jeffrey Toobin, *Drawing the Line*, The New Yorker, at 35 (Mar. 6, 2006) (quoting Stanford Law School Professor Pamela Karlan); *see also* Peter H. Shuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 Colum. L. Rev. 1325, 1329 (1987) (gerrymandering raises "profound issues concerning the legitimacy of our representational structures").

reflected by the lowest voter turnout in 2014 in any election since 1942.[42]

When gerrymandering is used to establish safe districts, the proliferation of those safe seats leads to a more polarized and dysfunctional political climate. In safe districts, an incumbent's biggest threat is often a primary challenge from a more extreme member of his or her own party. This threat makes legislators reluctant to work across the aisle and support bipartisan legislation. Gerrymandering thus worsens "the hyper-partisanship that paralyzes our politics and governance."[43]

Public trust in our democracy is further weakened by the lack of transparency in how redistricting is funded. The influx of dark money compounds this concern, replacing the will of the people with the will of anonymous special interests and wealthy donors. Dark money also increases the risk that politicians become beholden to the special interest groups funding redistricting efforts, rather than to their constituents. Recent surveys have shown that a significant majority of Americans believe "it doesn't matter if they vote," because politics and elections are controlled by wealthy interests.[44] This sentiment is bipartisan:

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[42] Brian Klaas, *The Despot's Accomplice: How the West is Aiding and Abetting the Decline of Democracy* 184 (2017).

[43] Jared Dews, *A Primer on Gerrymandering and Political Polarization*, Brookings (July 6, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/06/a-primer-on-gerrymandering-and-political-polarization/.

[44] *See, e.g.*, Betsy Cooper, et al., PRRI, *The Divide Over America's Future: 1950 or 2050? Findings From the 2016 American Values Survey* (Oct. 25, 2016), https://www.prri.org/research/poll-1950s-2050-divided-nations-direction-post-election/; *Views on Power and Influence in Washington*, Assoc. Press-NORC Ctr. for Pub.

"Democrats and Republicans generally agree that people like them, working people, the poor, and small businesses don't have enough power in Washington, and that political lobbyists, Wall Street, large businesses, and the wealthy have too much influence."[45] And not without reason: studies have found that "the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy."[46]

Americans are particularly troubled by how special interest groups are helping to gerrymander state and federal legislative districts. Across party lines, 64% of Americans believe that redistricting is a tactic to take power away from voters.[47] 71% of Americans believe that "those who stand to benefit from redrawing congressional districts should not have a say in how they are redrawn."[48] One Wisconsin senator who voted for the redistricting plan at issue in *Gill* expressed remorse for his vote, explaining, "[w]hen you talk to people about our government, the thing they

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Affairs Research (2017), http://www.apnorc.org/projects/Pages/Power-and-Influence-in-Washington.aspx [hereinafter AP-NORC Poll].

[45] AP-NORC Poll, *supra* note 45.

[46] Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives on Politics 564, 575 (Sept. 2014), https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf.

[47] *Americans Across Party Lines Oppose Common Gerrymandering Practices*, The Harris Poll (Nov. 7, 2013), http://www.theharrispoll.com/politics/Americans_Across_Party_Lines_Oppose_Common_Gerrymandering_Practices.html.

[48] *Id.*

tell you is it's rigged."[49] Indeed, the process of redistricting merits little faith because drawing district lines is "among the most easily manipulated and least transparent systems in democratic governance."[50]

Finally, Americans are not the only ones who have observed how partisan gerrymandering has undermined our political system. America's democracy has long stood as a model to the world, a "city [on] a hill."[51] Partisan gerrymandering now threatens that role. A scholar of comparative politics recently remarked that "the American model is not the only viable one out there, and . . . other nations may not be insane to look at it with some sense of distaste."[52] Rooted in part in our use of partisan gerrymandering, this view creates "knock-on effects that damage the core of democracy."[53]

That study of different democratic countries concluded that America's extreme gerrymandering threatens the very fabric of our democracy and "mak[es] a mockery of the one person, one vote principle that is the granite ridge to which democracy should be anchored."[54] Amicus agrees.

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[49] Bazelon, *supra* note 2.

[50] Dews, *supra* note 43.

[51] *See* Governor John Winthrop, A Model of Christian Charity, at 12 (1630); President Ronald Reagan, *Election Eve Address: A Vision for America* (Nov. 3, 1980), https://www.reaganlibrary.gov/11-3-80.

[52] Klaas, *supra* note 42, at 188.

[53] *Id.* at 183.

[54] *Id.* at 185 (internal quotation marks omitted).

II. The Court Should Curb The Rise Of Partisan Gerrymandering By Affirming The District Court Decisions.

When it comes to partisan gerrymandering, this Court can no longer remain on the sidelines. In *Reynolds v. Sims*, the Court explained that "[a]s long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system." 377 U.S. 533, 562 (1964). The Court should reaffirm this principle by holding that partisan gerrymandering claims are justiciable and that the North Carolina and Maryland plans violate the Constitution.

The *Rucho* court held that the North Carolina plan violated the Equal Protection Clause by applying a test similar to the test applied in *Gill*. That test—which requires evidence of discriminatory intent, a large and durable discriminatory effect, and a lack of a legitimate justification—provides a clear roadmap for lower courts and is grounded in this Court's precedents. The test addresses this Court's prior concerns by articulating a clear standard that avoids sweeping in legitimate political conduct. The test is manageable, and, importantly, will impose a needed threat of judicial accountability to constrain future partisan gerrymandering efforts.

The first element of the equal protection test—discriminatory intent—provides a workable standard that addresses the concerns expressed in *Vieth*. For this element, the district court analyzed whether the

"predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power'" *Rucho* J.S. App. 145a–146a (quoting *Ariz. State Leg.*, 135 S. Ct. at 2658). Unlike the proposed intent requirements addressed in *Vieth*, this test captures only those political classifications "applied in an invidious manner or in a way unrelated to any legitimate legislative objective." 541 U.S. at 307 (Kennedy, J., concurring). The test is also a workable one, allowing courts to consider different forms of intent evidence including admissions, rejection of more neutral plans for no apparent reason, secrecy and lack of transparency surrounding the redistricting process, and unwillingness to include minority party voices. When politicians admit that their efforts to redraw district lines were intended to create undemocratic outcomes, courts should hold them accountable.[55]

The second element of the equal protection test—discriminatory effect—also addresses the concerns articulated in *Vieth*. The district court considered whether "the lines of a particular district have the effect of discriminating against—or subordinating—

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[55] A state ordinarily should find safe harbor against any allegation that it acted with discriminatory intent when it entrusts redistricting to an independent redistricting commission. *See, e.g., Ariz. State Legislature*, 135 S. Ct. at 2652. As this Court recognized implicitly in *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973), safe harbors could also include districts designed by "a three-[person] bipartisan Board" rather than a single-party-controlled state legislature, or other processes that incorporate minority voices and promote public scrutiny and transparency through openness and publication of proposed and revised maps. When states take steps like these to protect redistricting from partisan influence, they ought rightly to insulate themselves from cries of foul play.

voters who support candidates of a disfavored party," and "if the district dilutes such voters' votes by virtue of cracking or packing." *Rucho* J.S. App. 151a. Unlike in prior cases, plaintiffs here focus on dilution of their votes due to their political affiliations, rather than on any claim to proportional representation. *Cf. Vieth*, 541 U.S. at 308 (Kennedy, J., concurring) (rejecting fairness principle based on a proportionality theory).

The Court has recognized that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms." *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). Vote dilution is a firmly rooted constitutional injury and provides a sound basis for the discriminatory effect test. And as Appellees demonstrate, experts can now readily measure the dilutive effects of partisan gerrymandering through election results, partisan bias, the "efficiency gap," and sensitivity testing. These are exactly the sort of advancements "that make more evident the precise nature of the burdens gerrymanders impose." *Vieth*, 541 U.S. at 312–13. Wild mismatches between the popular vote and the balance of the delegation are an obvious signal.

The final factor of the equal protection test—lack of a legitimate justification—also speaks to *Vieth*'s concerns. This part of the test ensures that courts can distinguish between district maps drawn to achieve legitimate objectives and those based on impermissible partisan considerations. For example, this element will defeat claims where a non-partisan explanation, such as geographical distribution of voters, accounts for the map's alleged discriminatory effect. *See, e.g., Rucho* J.S. App. 152a–153a

("examin[ing] whether districts' discriminatory partisan effects are justified by a legitimate state districting interest or neutral explanation"). This element appropriately guarantees that legitimate legislative decisions will not be lumped in with naked retaliation based on party affiliation.

The district courts in both cases also held that the districting plans violated the First Amendment. *See Lamone* J.S. App. 4a; *Rucho* J.S. App. 299a–300a. The First Amendment test applied in both cases also provides a workable standard for analyzing partisan gerrymandering claims.

Indeed, the First Amendment test largely mirrors the equal protection analysis by focusing on intent, injury, and causation. For the intent element, the First Amendment test asks whether "those responsible for [a redistricting] map redrew the lines of [plaintiff's] district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated." *Lamone* J.S. App. 43a (first alteration in original) (internal quotation marks omitted). For a claim alleging injury based on vote dilution, the First Amendment test requires that "the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect." *Id.* (internal quotation marks omitted). And for causation, the First Amendment test examines whether "the mapmakers' intent to burden a particular group of voters by reason of their views was a but-for cause of the adverse impact." *Id.* (internal quotation marks omitted); *see also Rucho* J.S. App. 286a. Like the equal protection test, the similar First

Amendment test also addresses the concerns expressed in *Vieth*.

The Court should affirm the equal protection and First Amendment tests applied in these cases. But even if the Court concludes that these tests are inadequate, the Court should, at a minimum, hold that partisan gerrymandering claims are justiciable. As discussed above, the *Vieth* plurality's retreat from *Davis v. Bandemer*, 478 U.S. 109 (1986), has resulted in more frequent and extreme gerrymandering at the expense of our democracy. *See supra* Part I.

Moreover, the plurality's reasons for deeming partisan gerrymandering claims non-justiciable are unpersuasive. For example, the plurality relied in part on Congress's power to make or alter redistricting lines. *See Vieth*, 541 U.S. at 275–77. But the Constitution leaves room for both Congress and the courts to remedy the problem of partisan gerrymandering. Nothing in Article I, Section 4 provides Congress with *exclusive* authority to modify congressional districts. And the question for courts is not what districts should look like, but whether partisan forces have manipulated the process to dilute votes based on political affiliation. *Cf. Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be *constitutionally* obtained." (emphasis added)).

Even if the democratic process could prevent excess partisan gerrymandering in some cases, the Court must still step in where, as here, the democratic process has been used to violate citizens' fundamental rights. *See League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 415 (2006) (Kennedy, J.) ("[O]ur precedents recognize an important role for

the courts when a districting plan violates the Constitution."); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) ("[T]he Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights.").

The *Vieth* plurality incorrectly suggested that Congress alone can solve the problem of partisan gerrymandering. The facts on the ground since *Vieth* demonstrate that the political process alone cannot provide an adequate solution. Judicial review is a necessary ingredient to restoring our democracy. This Court should hold that partisan gerrymandering claims are justiciable and that the North Carolina and Maryland redistricting plans are unconstitutional.

CONCLUSION

For the foregoing reasons, and those in Appellees' briefs, the Court should affirm the district court decisions.

Respectfully submitted,

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